Introduction

Separation of powers is a model of governance for democratic states where the state is divided into three branches. The three branches are the executive (enforces laws), the legislature (makes laws) and the judiciary (interprets law), each with separate and independent powers and areas of responsibility. Governance¹ that is based on a constitution premised on the doctrine of separation of powers safeguards the nation against abuse of power by the rulers who may want to pursue their own interests at the expense of basic rights of those they govern.

Origin of the doctrine

The term separation of powers got its scientific form from the French philosopher Montesquieu who categorized governmental functions as executive, legislative and judicial. He believed that those possessing power would grasp more powers unless checked by other power-holders, thus separation of powers. The epic of the doctrine came with the American independence that saw it being operationalised.

In its pure form, separation of powers assumes a separate, distinct, and independent function of the three arms of government, the executive, judiciary and the legislature. In this order:

1. The same person cannot belong to more than one of the three arms of government.

2. One organ of government should not take or infringe upon the powers and work of another, for instance the judiciary should be independent of the executive and ministers should not be responsible to parliament.²

3. A person holding office in one organ of government should not owe his term of office to the will or preferences of persons in any other.

It is important to note that the doctrine of separation of powers was never meant to be rigid, with absolute separation of the arms of government. Rather it requires a system in which the risks of a concentration of powers,

¹ Governance relates to decisions that define expectations, grant power or verify performance. It describes the process of decision-making.
and the attendant dangers that go with it, can be reduced through limited interference by each of the three powers in each other's domain. However, in practice these three arms may overlap.

Three Arms of Government

Executive

The executive arm of government has sole authority and responsibility for the daily administration of the state. The separation of powers system is designed to distribute authority away from the executive branch to preserve individual liberty in response to cruel leadership throughout history. The executive is not supposed to make laws (the role of the legislature), or interpret them (the role of the judiciary). The role of the executive is to enforce the law as formulated by the legislature and interpreted by the judicial system.

Legislature

The legislature is the law-making arm of government in Zimbabwe. It deliberates on issues and has the power to pass, amend and repeal laws. In the separation of powers doctrine, the legislature is equal to and independent of both the judiciary and the executive. In Zimbabwe legislative authority is vested in Parliament, which is composed of 210 Members House of Assembly and Senate, which is made up of 93 Senators.

Judiciary

The judiciary is the system of courts, which interprets and applies the law in the name of the sovereign or state. The judiciary provides a mechanism for the resolution of disputes. Under the doctrine of the separation of powers, the judiciary generally does not make law (which is the responsibility of the legislature) or enforce law (which is the responsibility of the executive), but rather interprets law and applies it to the facts of each case. This branch of government is often tasked with ensuring equal justice under law. It usually consists of a court of final appeal (called the "supreme court" or "constitutional court"), together with lower courts, which are the High Court and Magistrate's Courts.

Constitution making

Article VI of the Global Political Agreement (GPA) acknowledges that it is the fundamental right and duty of the Zimbabwean people to make a constitution by themselves and for themselves.

The principals to the GPA, in the same article, also express their determination to create conditions for the people to write a constitution for themselves mindful of the need to ensure that the new constitution entrenches democratic values and principles and the protection of the equality of all citizens, particularly the enhancement of full citizenship. There is need for all stakeholders'
participating in the constitution making process to ensure a people driven constitution that will have the ownership it deserves. When the people make contributions to the writing of the constitution they need to take into consideration the doctrine of separation of powers as a core value of constitutionalism.

**Separation of powers: Zimbabwean experience**

Judge President Makarau sums up the Zimbabwean experience; noting that there is gross violation of this doctrine. The executive, during the ZANU PF government, was all-powerful to the extent of stifling other arms. This has compromised the independence and the impartiality of the judiciary, and the vibrancy of the legislature. As noted by Fombad

> Whilst the separation of powers is either explicitly or implicitly provided for in a wide variety of ways, the scope for mutual checks and balances that are part of the doctrine diminish in many of these constitutions as a result of the exorbitant powers conferred on the executive to interfere with the other two branches of government.

An example of a breach of the doctrine in our current framework is the Presidential Powers (Temporary Measures) Act [Chapter 10:20], which gives the President powers to create law. The act allows the President to make regulations when it appears to him that a situation has arisen or is likely to arise which needs to be dealt with urgently in the interests of defence, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest and the situation cannot adequately be dealt with in terms of any other law. The role of the executive in the judiciary following the “Fast Track Land Reform Programme” is well documented. This presence yet another example of how the doctrine of separation of powers was distorted by the executive in Zimbabwe before the inception of the Government of National Unity. Even though Chapter VIII of the Constitution of Zimbabwe provides for the body of judges, the executive is the one that appoints them to the bench. In spite of some guarantees of non interference by the executive in the operations of the judiciary, evidence of manipulation of the judiciary has been recorded. Such cases, as noted by the Judge President Makarau need urgent attention in the constitution making process.

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1. [www.thezimbabwetimes.com](http://www.thezimbabwetimes.com)
2. The end of ZAPU as party and the demise of the reserved White seats in parliament created a lethargic parliament which was rescued by the entry of MDC in the year 2001 in parliament. Now the parliament is not only active, but also less rubberstamping than in the 1990s.
Conclusion

The spirit of constitutionalism is in the separation of powers between the judiciary, executive and the legislature. This very ancient practice forms the basis of all democratic societies. Zimbabwe subverted this noble doctrine when it allowed the executive to dominate other arms of government in the past. Now it is incumbent that we correct the situation and the drafting of a new constitution provides us with an opportunity to do so. As people write their own constitution they must be wary of this (doctrine of separation of power) and ensure that measure are put in place to ensure that the doctrine is not violated.